

STATE OF MICHIGAN
COURT OF APPEALS

GERALD HUTCHINSON, Personal
Representative of the Estate of KATHERINE
HUTCHINSON, the Estate of CHRISTINE
HUTCHINSON, and the Estate of TIFFANY
HUTCHINSON,

UNPUBLISHED
August 14, 2003

Plaintiff-Appellant/Cross-Appellee,

v

TOWNSHIP OF PORTAGE, WILLIAM J.
BROWN, H. WATTS STAMPER, and WAYNE
SUIDA,

No. 240136
Mackinac Circuit Court
LC No. 98-004476-NO

Defendants-Appellees/Cross-
Appellants,

and

CRAIG OUTWATER, GREG KEMPPAINEN and
ROCKY WOODWARD,

Defendants-Appellees.

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

This case arises from the tragic drowning deaths of plaintiff Gerald Hutchinson's family members, specifically, his wife Katherine Hutchinson and their daughters Christine Hutchinson and Tiffany Hutchinson. Plaintiff appeals as of right from the trial court's orders granting summary disposition in favor of defendants Township of Portage, Greg Kemppainen, Craig Outwater, and Rocky Woodward and from the court's judgment granting directed verdicts in favor of defendants William J. Brown, H. Watts Stamper, and Wayne Suida. We affirm.

Plaintiff first argues that the trial court erred in directing a verdict in favor of defendant Suida. The trial court's decision on a motion for a directed verdict is reviewed *de novo*. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). We review all the evidence presented up to the time of the motion to determine whether a question of

fact existed. *Id.* at 701-702. In doing so, we must view the evidence in the light most favorable to the nonmoving party and grant him every reasonable inference and resolve any conflict in the evidence in his favor. *Id.* at 702.

At the time of the drowning incidents, Suida was employed by Michigan's Department of Natural Resources (DNR) as the supervisor of the Tahquamenon Management Unit, which managed the dredging project in Big Manistique Lake. The DNR was responsible for providing the employees and equipment to complete the dredging project. Suida, specifically, was responsible for working with the Township of Portage (the township) to design the lake improvements and, more generally, was responsible for ensuring that adequate signage existed at the DNR boat launches he oversaw. The issued permit authorized dredging an area 20 feet by 75 feet by 4½ feet deep around the boat launch. The actual area dredged was 77 feet by 400 feet by 8 feet deep.

There is no dispute that Suida was a governmental employee entitled to governmental immunity from ordinary negligence. However, plaintiff asserts that Suida's actions or lack thereof constituted gross negligence. In order to be held liable for the drowning deaths, Suida's conduct must have amounted to "gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). Gross negligence in this context is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id.* Additionally, Suida's conduct must have been "the" proximate cause, i.e., "the one most immediate, efficient, and direct cause of the injury or damage, not "a" proximate cause of the decedents' deaths. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).¹ Furthermore, plaintiff bears the burden of proving that Suida's conduct was outside the protective scope of the qualified governmental immunity provided in MCL 691.1407(2). *Mack v Detroit*, 467 Mich 186, 201; 649 NW2d 47 (2002).

We hold that the trial court correctly granted a directed verdict in favor of Suida because he was protected by the general immunity from tort liability granted to governmental employees by MCL 691.1407(2) with regard to any arguable negligence on his part in relation to this case. Plaintiff presented evidence that the relevant area was dredged to an extent of about eight feet, in excess of the four-foot limit in the relevant permit. In our view, it is plain that dredging under a lake to an extent of eight feet, even without posting warnings of the depth of the dredging, does not in itself constitute gross negligence under the statutory definition, which requires conduct so reckless as to show a substantial lack of concern for whether injury results. It is common knowledge that deep drop-offs can occur naturally in a lake. Further, one would reasonably expect people swimming or wading in a lake to ordinarily be alert to such dangers and for parents to ordinarily supervise young children quite closely in a lake, especially if the children had little or no swimming skills.

However, plaintiff essentially indicates that Suida can be charged with gross negligence based on the fact that the dredging in this case exceeded the extent authorized by the permit.²

¹ Our Supreme Court has recently held that *Robinson* is to be applied retroactively. *Ewing v Detroit*, 468 Mich 886; 661 NW2d 235 (2003).

² The depth of dredging authorized by the permit is apparently governed by environmental and
(continued...)

Assuming for purposes of discussion that Suida can personally be held responsible for the overdredging and the lack of warning signs, we disagree with plaintiff's indication, because a violation of a regulatory permit, standing alone, does not in itself show a substantial lack of concern for whether a person will be injured as a result. In *Stanton v Battle Creek*, 466 Mich 611, 613; 647 NW2d 508 (2002), the principal plaintiff was injured in connection with the operation of a forklift by a city employee. Our Supreme Court, applying the relevant immunity provision of MCL 691.1407(2), concluded that no reasonable mind could find that the governmental employee was grossly negligent under the circumstances of that case, despite the fact that the employee did not have a valid license to operate the forklift. *Stanton, supra* at 619-620. Also, in *Poppen v Tovey*, 256 Mich App 351, 358; ____ NW2d ____ (2003), this Court recently stated that the presumption arising from the violation of a statute is one of ordinary negligence, not gross negligence. Accordingly, the mere fact that an act by a governmental employee was conducted illegally in the sense that it was done without proper regulatory authorization, or in violation of a statute or regulation, does not mean that the act should be considered to constitute gross negligence. Thus, we conclude that the dredging at issue in this case and the lack of warning signs do not constitute gross negligence, even though the dredging exceeded the depth of dredging authorized by the permit.

Moreover, even if the "overdredging" or the lack of warning signs could be considered to constitute gross negligence, in our opinion, Suida would still be entitled to immunity because the depth of the dredging was not "the proximate cause" of the drownings. In *Robinson, supra* at 462, our Supreme Court held that in MCL 691.1407(2)(c), "the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amount to gross negligence *that is the one most immediate, efficient, and direct cause of the injury or damage*, i.e., the proximate cause" (emphasis added). Importantly, the *Robinson* Court overruled prior case law that allowed a plaintiff to avoid governmental employee immunity by showing merely that a governmental employee's gross negligence was "a" proximate cause of an injury. *Robinson, supra* at 458-461. Put simply, *Robinson* holds that it is not enough for a plaintiff to show that a governmental employee's gross negligence was a proximate cause of an injury, but rather the plaintiff must go further and prove that defendant's conduct was *the* proximate cause.

Turning to the present case, we conclude that the "overdredging" at issue cannot reasonably be found to be the one most immediate, efficient, and direct cause of the drownings. A "but for" causation is plainly not enough to meet "the proximate cause" test of *Robinson*. Further, while the direct role that the depth of the dredging played in the drownings might well suffice to make the "overdredging" or the lack of warning signs *a* proximate cause of the drownings, ordinary proximate causation is not sufficient under *Robinson*. In our view, it is readily apparent that a far more immediate, efficient, and direct cause of the drowning deaths was that the girls, who it was undisputed had little or no swimming ability, were allowed to swim without being accompanied by a sufficient number of people with good swimming ability in close proximity to them. In other words, the lack of close supervision of the girls was a more

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boating concerns, rather than swimming safety at or near the area of the boat ramp. For this reason, the violation of the permit may be irrelevant to plaintiff's claims. See *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986); and note on use for M Civ JI 12.01.

immediate, efficient, and direct cause of the drownings than the remote in time dredging or the failure to post warning signs.

Accordingly, we conclude that any conduct by Suida with regard to the latter matters cannot be considered “the proximate cause” of the drownings. Thus, because of our determinations concerning the “overdredging” and the lack of warning signs (1) not having constituted gross negligence and (2) not having been “the proximate cause” of the drownings, Suida is immune from liability under MCL 691.1407(2).

Plaintiff alternatively charges Suida with gross negligence based on his failure to inform Portage Township officials of the depth of the dredging. However, it is undisputed that Rhonda Blank, who had been to the lake, informed Brown, the township supervisor, of the deep drop-off in the lake before the drownings occurred. Thus, it is clear that any failure by Suida to inform township officials of the depth of the dredging was not “the proximate cause” of the drownings because township officials knew of the existence of the drop-off and reacted to it in advance of the drownings. Accordingly, Suida is immune under MCL 691.1407(2) for any liability based on his failure to notify township officials of the depth of the dredging.

Next, plaintiff argues that the trial court erred in directing a verdict in favor of defendants Brown and Stamper. On cross-appeal defendants Brown and Stamper argue that the trial court erred in denying their motion for summary disposition in which they asserted absolute immunity. The court concluded that there was a factual dispute regarding whether Brown and Stamper were acting within their authority. We address Brown’s and Stamper’s arguments first.

In reviewing a motion for summary disposition because a claim is barred by governmental immunity, we must consider the affidavits, depositions, admissions, and other documentary evidence submitted by the parties, and determine whether they indicate that the defendant is entitled to immunity. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82-83; 635 NW2d 323 (2001). If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of the facts, a determination whether the claim is barred is a question of law for the court to decide. An order granting summary disposition is reviewed de novo on appeal. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

Defendant Brown was the township’s supervisor and Stamper was a township trustee at the time of the drowning deaths. Both assert that they enjoy absolute immunity from liability under MCL 691.1407(5), not simply qualified immunity under MCL 691.1407(2). At the time this case was filed, MCL 691.1407(5) stated:

Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority.³

³ The provision was subsequently amended as to form only by 1999 PA 241.

This provision provides absolute immunity from all tort liability. Brown and Stamper are correct that this subsection, not subsection (2), applies to their acts that were within the scope of their authority as township supervisor and township trustee, respectively, because they are considered legislators. A township's elected supervisor and trustees are all part of the township's board, MCL 41.70, which is considered a legislative body, *Dearborn Twp v Dail*, 334 Mich 673, 685; 55 NW2d 201 (1952). Plaintiff does not contest this point.

Plaintiff argues, however, they were not acting within their authority. Specifically, plaintiff contends that Brown was willfully ignorant of his duties regarding the township park and grossly negligent when he allowed the park to be opened for the 1996 season without installing buoys in the lake to designate the swimming area, contrary to MCL 324.80198b, or having safety and rescue equipment on hand, contrary to MCL 333.12542, and in giving his approval of the dredging project after completion where the dredging went beyond the scope of the permit, contrary to MCL 324.30104. Essentially, with regard to Brown, plaintiff asserts that he acted outside the scope of his authority because he violated several statutes, i.e., his actions were illegal, and, therefore, outside the scope of his authority.

Stamper held the position of township trustee, but also worked for the township as an employee responsible for various maintenance tasks at the park. Plaintiff asserts that Stamper's actions were performed in his role as township trustee. Plaintiff contends that Stamper was grossly negligent in not placing buoys in the water after the overdredging and in the placement of the jug line, which plaintiff opines was woefully inadequate and illegal.

Addressing Brown first, we find that he is entitled to absolute governmental immunity under MCL 691.1407(5). According to the terms of the lease, the township was responsible for developing and maintaining the park, including the lake. As township supervisor, it was within Brown's authority to take actions in furtherance of the township's responsibilities regarding the park. Plaintiff apparently concedes that management of the park was within Brown's authority, as his argument focuses solely on the fact that Brown was not acting within his authority only because he did not comply with certain statutes.⁴ Furthermore, we note that the township in this case was responsible for operating the park in accordance with its lease terms and under the authority granted it by the enactment of 1905 PA 157.⁵ Control of the park rests, in this case, in the township board. MCL 41.421.

In determining whether Brown's actions were outside the scope of his authority, we turn to an analogous case, *Richardson v Jackson Co*, 432 Mich 377; 443 NW2d 105 (1989), in which the plaintiff alleged the defendant was grossly negligent in failing to properly warn swimmers of a severe drop-off in the lake's swimming area. Our Supreme Court held that a governmental entity's violation of a statute, where the entity is discharging a governmental function, is not ultra vires. *Id.* at 387. Although *Richardson* dealt with MCL 691.1407(1), the subsection that

⁴ If plaintiff did not believe that compliance with the statutes was within Brown's authority, then he would have no reason to bring this cause of action against Brown.

⁵ See MCL 41.421 *et seq.*

provides absolute immunity from tort liability for governmental agencies, we find the reasoning applies equally to MCL 691.1407(5). As the *Richardson* Court stated:

In sum, ultra vires activity is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner. Defendants did not lack authority to operate this beach. [*Id.*]

Therefore, as long as Brown had the authority to perform the actions he did, the fact that he performed them negligently does not strip him of immunity under MCL 691.1407(5). Thus, Brown's alleged failure to operate the park in compliance with particular statutes does not place his actions outside his authority.

Also, plaintiff faults Brown for failing to supervise Stamper in the placement of the jug line. As township supervisor, supervision of Stamper was clearly within Brown's authority. Accordingly, we hold that Brown is entitled to enjoy absolute immunity from tort liability as provided in MCL 691.1407(5), and the trial court erred in denying defendant Brown's motion for summary disposition. Therefore, we do not reach plaintiff's issue regarding the court's directed verdict in favor of Brown.

In regards to Stamper, the issue is clouded by Stamper's dual role as township trustee and township employee. Stamper confirmed that each position's duties were separate and distinct. Under the circumstances, we find that the trial court properly denied Stamper's motion for summary disposition because a question of fact existed as to whether the acts plaintiff complained of were performed by Stamper in his role as township trustee or employee.

We also find that the trial court properly directed a verdict in favor of Stamper. Any actions taken by Stamper in his capacity as a township employee were subject to the qualified immunity provided in MCL 691.1407(2).⁶ Again, grossly negligent conduct is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Stamper knew the lake had been dredged to a depth of around eight feet, but failed to recognize this hazard or install a demarcation line before the park was opened. After a near drowning incident at the lake due to the steep drop-off, Stamper installed a line of plastic jugs that were anchored in the lake by plastic buckets filled with cement and tied off to a tree on the shore. Stamper did not install buoys because they were expensive and the next township board meeting at which such an expenditure could be approved was too far in the future. Viewing the evidence in the light most favorable to plaintiff, we find that a reasonable jury could not conclude that Stamper's actions constituted gross negligence. While Stamper's conduct could certainly be classified as negligent, the fact that he took steps to install the line showed a modicum of concern for lake users' safety. Therefore, we hold that the trial court properly granted Stamper a directed verdict.

⁶ Neither party discussed the applicability of MCL 691.1407(5) to Stamper's actions at trial. Therefore, we confine our discussion to plaintiff's allegation that Stamper was grossly negligent.

Plaintiff also argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Craig Outwater in regards to his gross negligence claim. However, plaintiff cites no legal authority for his position, and thus, has abandoned this issue on appeal. In any event, we find that a reasonable jury could not conclude that Outwater was grossly negligent as defined in MCL 691.1407(2)(c).

Affirmed.

/s/ Richard Allen Griffin

/s/ Peter D. O'Connell